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IN THE

Supreme Court of the United States

October Term, 1969

No. 108

THE COLONNADE CATERING CORP., *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF

I

There cannot be a valid waiver *in futuro* of Fourth Amendment rights.

Although reduced to the status of an alternative articulation in a footnote, the government, quoting the Second Circuit below, still contends that liquor dealers waive *in futuro* their Fourth Amendment rights (Brief, p. 23, n. 20). The contention is without merit.

In a recent case, *James* v. *Goldberg,* 303 F.Supp. 395 (S.D.N.Y. 1969), *jurisdictional statement filed sub nom.*

Wyman v. *James*, 38 U.S.L. Week 3237 (No. 977, Oct. Term, 1969), a federal three-judge court for the Southern District of New York labored its way around the Second Circuit's ruling in the instant case; and held that state officials could not condition receipt of state Aid to Families With Dependent Children (AFDC) on the recipients' agreeing to warrantless home visits. The court in one paragraph of its opinion reasoned:

> Even if we assume that AFDC grants are a privilege or governmental gratuity,[11] the power of government to decline to extend these benefits to its citizens "does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." Parris v. Civil Service Comm'n of the County of Alameda, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 630, 425 P. 2d 223 (1967). For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right. Thompson v. Shapiro, 270 F.Supp. 331, 336 (D. Conn. 1967), aff'd, 389 U. S. 1032, 88 S.Ct. 784, 19 L.Ed. 2d 820 (1969). While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.C. Social Security & Public Welfare §9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor. No showing merely of a rational relationship to some

valid governmental policy will suffice. Sherbert v. Verner, 374 U. S. 398, 406, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963); Speiser v. Randall, 357 U. S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958); Wieman v. Updegraff, 344 U. S. 183, 191-192, 73 S.Ct. 215, 97 L.Ed. 216 (1952); American Communications Ass'n v. Douds, 339 U. S. 382, 390, 70 S.Ct. 674, 94 L.Ed. 925 (1950); Thomas v. Collins, 323 U. S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Nor will it suffice for the state to show merely that the public interest justifies the type of search in question. For the issue is not whether the public interest justifies home visits, but whether the initial or continued receipt of AFDC benefits can in consonance with the Constitution be made dependent upon the applicants' or recipients' submission to *warrantless* searches.[12]

In footnote 12 the three-judge court put this pertinent question:

> An analogy may be drawn between the listing of dependents on an income tax return and the listing of dependent children on applications for public assistance. Yet, could it be successfully argued that the right to obtain an income tax exemption for such dependents may lawfully be made dependent upon the taxpayer's consent to the warrantless entry into his home of Internal Revenue Service Agents?

II

The fact that inspection provisions relating to liquor dealers have a long history does not establish an exception to the Fourth Amendment.

The framers of the Fourth Amendment provided for two things. To begin with, they provided: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." There is no exception. Then they added: "and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Again there is no exception. If the framers of the Fourth Amendment had intended an exception for the premises of liquor dealers, they would have said so.

III

The government's own brief demonstrates that the Fourth Amendment's warrant procedure will not unduly burden the Internal Revenue Service.

The government in its brief (p. 26) expressed the fear that a warrant procedure would frustrate an essential governmental purpose in that the evidence would be destroyed. But the government's own brief presents facts which belie this fear. In the instant case the government had a full week in which to get a warrant. As government counsel stated in argument before District Judge Weinstein, "one of these very agents was at a Bar Mitzvah there the weekend before, and he saw what looked to him

to have been refilled bottles, and so he went and he put in a routine complaint, which was being acted on this following Saturday" (A. 31a-32a).

Moreover, according to the government's brief (pp. 26-27) the government conducts thousands of inspections of retail liquor dealers throughout the nation without any resistance from the liquor dealers. For the following fiscal years there were the following numbers of inspections:

Year	*Inspections*
1963	24,154
1964	23,883
1965	13,366

Further, to quote the government's brief: "Very few of these dealers refused consent to an inspection.[23]" In footnote 23 the government added: "The estimate of the refusal rate in the North Atlantic region is 1 out of 75; the area supervisors of the Mid Atlantic region could not recall any refusals or objections to conducting inspections." What happened in the 1 refusal out of 75 requests in the North Atlantic region the government's brief does not disclose. However, the government's brief indicates that the instant case is the only one in which force was used: "We are advised by the Internal Revenue Service that the present case is the only one in which, to their knowledge, force has been used to gain entry to the premises of a retail liquor dealer" (Brief, p. 30, n. 26). Thus to extend the Fourth Amendment to the Internal Revenue Service will not burden the Service. And surely to have required an agent of the Service to obtain a warrant in the full week in which he had to do so would not have been burdensome.

Government counsel are opposed to the warrant procedure because they have been advised that inspections of liquor dealers in the North Atlantic and Mid-Atlantic regions are "based on some reason to believe or suspect", less than probable cause, that a refill violation is occurring (Brief, p. 28). But the answer to this point is that the standard of reasonableness for probable cause will vary with the type of case involved. As the Court pointed out in *Camara* v. *Municipal Court*, 387 U. S. 523, 538-39 (1967):

> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. *Frank* v. *Maryland*, 359 U. S., at 373. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186. Such an approach nei-

ther endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See *Eaton* v. *Price*, 364 U. S., at 273-274 (opinion of Mr. Justice BRENNAN).

IV

What the government is really seeking to do is to convert inspection provisions into unconstitutional general warrants to search for evidence, to be executed by force, if necessary.

The government near the end of its brief discloses its real purpose, namely, to convert inspection provisions into unconstitutional general warrants to search for evidence: "Since, in accord with the opinion below, we are of the view that the statutory authorization at issue here is basically the equivalent of a warrant, we believe that the use of minimal force—as here—to gain entry to the storeroom of a retail liquor dealer during business hours is consistent with *See*" (Brief, p. 32). But *See* v. *City of Seattle*, 387 U. S. 541 (1967) leads to no such result.

Although *Warden* v. *Hayden*, 387 U. S. 294 (1967), overruled *Gouled* v. *United States*, 255 U. S. 298 (1921), and sanctioned a reasonable search for evidence incident to a lawful arrest, it did not overrule *McDonald* v. *United States*, 335 U. S. 451 (1948), or *Johnson* v. *United States*, 333 U. S. 10 (1947), or *United States* v. *Lefkowitz*, 285 U. S. 452 (1931).

The Court in *Hayden* did not overrule *McDonald* v. *United States,* 335 U. S. 451 (1948), where the Court invalidated a search without a warrant, saying:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. 335 U. S. at 455-56.

The Court in *Hayden* did not overrule *Johnson* v. *United States,* 333 U. S. 10 (1948), involving a hotel room, where the Court held and said:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any as-

sumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. 333 U. S. at 13-14.

The Court in *Hayden* did not overrule *United States* v. *Lefkowitz*, 285 U. S. 452 (1932), where the Court stated:

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States*, 273 U. S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U. S. 383. *Agnello* v. *United States*, 269 U. S. 20, 32. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests.

> Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt,* 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra,* 358. 285 U. S. at 464.

Rule 41(b) of the Federal Rules of Criminal Procedure still specifies these three, and only these three, grounds for the issuance of a warrant to search for and seize any property:

> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18 U.S.C., §957 [Possession of property in aid of foreign government].

The conduct of the agents of the Internal Revenue Service in the instant case proved that they were trying to convert inspection provisions into general warrants to search for evidence. They were not seeking to collect any taxes; for the petitioner was the holder of a federal retail liquor dealer's occupational tax stamp. They were not looking for an illicit distillery; for in such a quest 26 U.S.C. §5203 (b) provides that, where entry is refused, "it shall be lawful for such officer, at all times, as well by night as by day, to use such force as is necessary for him to gain entry to such premises." Whatever may be the constitutional status

of this provision, it is there. The agents in the instant case were simply engaged in an unconstitutional general search to see what they could find.

The conduct of the agents of the Internal Revenue Service in the instant case also proves the necessity of interposing between the individual and "the discretion of the official in the field," *Camara* v. *Municipal Court*, 387 U. S. 523, 532 (1967), the detached scrutiny and the consequent deliberate impartial judgment of a judicial officer, as the Court has often pointed out. The agents began with a force of four strong: three of them; and a policeman from the Nassau County Police Department (5a). Later they were joined by an Internal Revenue Service Area Supervisor (6a), for a total of five. They made a search of that portion of petitioner's premises which was open to the public (5a). Then without the petitioner's consent they also searched non-public portions of the premises, including the basement (5a-6a). Thereafter, without permission and without a warrant they broke open the petitioner's locked liquor storeroom (6a). The agents entered the storeroom, and, as their own receipt shows, seized 53 bottles of liquor, some full and others partially filled, and two funnels. They seized 38 bottles "to determine if genuine":

CONTAINERS				
umber	*Size*	*Portion Filled*	*Description of Contents*	*Purpose of Analysis or Test*
1	Qt	Full	J&B Scotch	To Determine if Genuine
2	Qt	Full	J&B Scotch	To Determine if Genuine
3	Qt	Full	J&B Scotch	To Determine if Genuine
4	Qt	Full	J&B Scotch	" " " "
5	Qt	Full	J&B Scotch	" " " "

Containers				
Number	*Size*	*Portion Filled*	*Description of Contents*	*Purpose of Analysis or Test*
6	Qt	Full	J&B Scotch	" " " "
7	Qt	Full	J&B Scotch	" " " "
8	Qt	Full	J&B Scotch	" " " "
9	Qt	Full	J&B Scotch	" " " "
10	Qt	Full	Chivas Regal	" " " "
11	4/5	Full	Chivas Regal	" " " "
12	4/5	Full	Chivas Regal	" " " "
13	4/5	Full	Haig & Haig Pinch	" " " "
14	4/5	Full	" " " "	
15	Qt	Full	White Label Scotch	To Determine if Gen
16	4/5	Full	" " " "	" " " "
17	4/5	3/4	" " " "	" " " "
18	4/5	3/4	" " " "	" " " "
19	Qt	Full	Haig Scotch	" " " "
20	Qt	1/2	" " "	" " " "
21	4/5	Full	Grant's Scotch	" " " "
22	Qt	1/4	Ballantines Scotch	" " " "
23	Qt	1/4	100 Pipers Scotch	" " " "
24	4/5	Full	Wild Turkey	" " " "
25	4/5	Full	" "	" " " "
26	4/5	3/4	" "	" " " "
27	Qt	Full	Hennessy Cognac	" " " "
28	4/5	1/2	" " " "	" " " "
29	4/5	Full	" " " "	" " " "
30	4/5	1/2	Seagrams 7 Crown	" " " "
31	4/5	Full	Seagram's Crown Royal	To Determine if Gen
32	4/5	Full	"	" " " " "
33	4/5	1/2	Schenley	" " " " "
34	Qt	Full	I.W. Harper	" " " " "
35	Qt	Full	Canadian Club	" " " " "
36	4/5	1/2	Old Grand-Dad	" " " " "
37	4/5	Full	Jack Daniels	" " " " "
38	4/5	1/2	Drambuie	" " " " "

(11a-13a)

They seized 15 more bottles as a "comparative sample":

CONTAINERS				
ber	*Size*	*Portion Filled*	*Description of Contents*	*Purpose of Analysis or Test*
A	⅘	Full	Wild Turkey	Comparative Sample
B	Qt	Full	I.W. Harper	" " "
C	⅘	Full	Seagram's Crown Royal	" " "
D	⅘	Full	Old Grand-Dad	" " "
E	Qt	Full	J&B Scotch	" " "
F	Qt	Full	Haig Scotch	" " "
G	⅘	Full	White Label	" " "
H	⅘	Full	Grants Scotch	Comparative Sample
H-2	⅘	Full	Ballantine Scotch	" " " "
I	⅘	Full	Chivas Regal	" " " "
J	⅘	Full	Jack Daniels	" " " "
K	Qt	Full	Canadian Club	" " " "
L	Qt	Full	Seagrams VO	" " " "
M	Qt	Full	100 Pipers	" " " "
N	Qt	Full	Haig & Haig	" " " "

14a)

They seized two funnels "for evidence":

CONTAINERS				
er	*Size*	*Portion Filled*	*Description of Contents*	*Purpose of Analysis or Test*
			Plastic Funnel Sm.	For Evidence
			Metal Funnel Lg.	For Evidence

Clearly the agents in the instant case were making the kind of general exploratory search which was one of the factors involved in the American Revolution, and which subsequently led to the adoption of the Fourth Amendment.

The government's reliance in its brief on 18 U.S.C. §3109 is wholly misplaced; for section 3109 deals with the use of force in the execution of a warrant.

V

In any event, as a matter of statutory construction, the inspection provisions involved in the instant case do not contemplate the use of force.

Whenever the Congress wanted to provide for the use of force in search and seizure cases, it did so in specific terms. It did so in specific terms, for instance, in 18 U.S.C. §3109, where it provided for the use of necessary force in the execution of a warrant. It did so in 26 U.S.C. §5203 (b), for instance, when it provided for the use of necessary force in the entry of a distilled spirits plant.

By way of contrast, the Congress did not provide for the use of force in the inspection provisions in the instant case, 26 U.S.C. §§5146(b) and 7606(a). Rather the Congress provided in 26 U.S.C. §7342 for a forfeiture of $500.00 for each refusal to comply with a demand for inspection under 26 U.S.C. §7606, a provision which is comparable to the ordinance involved in *Frank* v. *Maryland,* 359 U. S. 360 (1959). *Cf. Zap* v. *United States,* 328 U. S. 624 (1946), *vacated on other grounds,* 330 U. S. 800 (1947). In addition, 26 U.S.C. §7212(a) makes it a felony punishable by fine or imprisonment, or both, to attempt to interfere with the administration of the internal revenue laws. Plainly the inspection statutes in the instant case do not contemplate the use of force.

The government in its brief, after quoting the inspection provision in an Act of 1791, discloses in a footnote that the 1791 Act also contained a warrant procedure (Brief, p. 11, n. 9). The government could have added

that ever since that time there has consistently been provision for a warrant procedure. The current provision is in the Internal Revenue Code of 1954. It is to be found in 26 U.S.C. §7302. This section provides, with reference to any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, that: "A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property."

Conclusion

The Court should reverse the judgment of the Second Circuit, and affirm that of the District Court.

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